UNITED NATIONS **A**

General Assembly

Distr.
LIMITED

A/AC.182/L.94
27 January 1997
ENGLISH
ORIGINAL: RUSSIAN

SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION
27 January-7 February 1997

Working paper submitted by the Russian Federation

Some ideas on the basic conditions and criteria for imposing and implementing sanctions and other enforcement measures

1. During its more than half-century of existence, the United Nations has developed a broad and diversified arsenal of means and instruments for the peaceful settlement of disputes and conflicts, as well as measures for exerting pressure on States whose policies pose a threat to the maintenance of international peace and security. Experience has shown that the United Nations has long placed special emphasis on the implementation of discretionary measures (negotiations, retortion, provisional measures under Article 40 of the Charter of the United Nations, non-binding sanctions imposed in accordance with General Assembly resolutions and implemented individually or collectively by States, and so on) and only in exceptional cases resorted to the use of mandatory sanctions and other enforcement measures not involving the use of armed force. This approach has made it possible to settle, in a more or less satisfactory manner, a number of international disputes and conflicts - by some counts, more than one hundred have been referred to the United Nations for consideration. However, in recent years, the United Nations has developed a kind of "sanctions syndrome" - the desire to impose sanctions and enforcement measures more broadly and more actively, sometimes in disregard of the political and diplomatic options that remain open.

2. However, if the application of mandatory sanctions in the case of an armed invasion of the territory of another State and a direct breach of international peace can be considered warranted from the point of view of the Charter and international law, in most other cases this can be - and has been - counterproductive and has had negative and destructive consequences not only for one or several States but for the entire international community.

3. At times the implementation of sanctions in the new generation of disputes and conflicts, especially those involving inter-ethnic, interdenominational,

territorial or other contradictions both between and - in particular - within States, seems questionable from a legal standpoint. In such conflicts, particularly in the case of a civil war, it is often difficult to determine which party is guilty of violating the peace, and the sanctions themselves may be indiscriminate, non-specific and, consequently ineffective and may only increase the already excessive burdens and sufferings borne by the innocent civilian population.

4. In such conflicts, consideration could, we believe, be given in a number of cases, not to mandatory sanctions but to another kind of measure employed by the Security Council, namely, provisional measures under Chapter VII, Article 40, of the Charter. Such measures are more in keeping with the aims of the peaceful and just settlement of conflicts, since they should be without prejudice to the rights, claims or position of the parties concerned and should only prevent an aggravation of the situation. The potential appeal of such measures is that they can ensure a flexible response to changes in the situation in the conflict region, prevent accusations of "double standards" and bias towards one of the parties to the conflict and reduce, if not eliminate, the special economic problems that the implementation of sanctions causes for third States. In practice, the Security Council's application of provisional measures has led to very tangible results in the settlement of international disputes and conflicts. The practical elaboration of the problems relating to provisional measures therefore seems quite urgent.

5. Of course, one cannot rule out the application of sanctions and other enforcement measures against those who stubbornly ignore United Nations demands. However, the adoption of such measures should in no case be approached from politically or ideologically partial or emotional positions. The threshold for the use of such measures should be high and clear criteria should be employed.

6. Such criteria include a real threat to international peace and security, the exhaustion of all other means, calculation of the probable consequences, the proportionality of the response to the threat, and so on. It follows that any sanctions should be part of the search for a long-term political settlement of the conflict, reflect the strategic goals of the entire international community, take account of the political and "physical" (in terms of death and suffering among the civilian population and the destruction of material values) cost of such actions.

7. In such exceptional cases, when the question of imposing mandatory sanctions arises, it is necessary to proceed from the fact that such measures are only one of a number of the non-military means of overcoming a real threat to international peace and security. In order to be warranted and effective, the sanctions must be strictly in keeping with the provisions of the Charter. They should be based not on political expediency but on a solid international legal basis and be implemented, as required by the Charter in accordance with the principles of justice and international law.

8. From the point of view of international law and justice, the sanctions should not have the implicit objective of causing of damage to third States, since this would undermine the very idea of such measures. Many countries (which have suffered and continue to suffer great material and financial damage

as a result of sanctions) are therefore completely justified in their desire to elaborate basic criteria and conditions for the application and implementation of mandatory sanctions, and develop ways and means of preventing the adverse consequences of such sanctions or, at least, reducing them to a minimum. In our view, such basic criteria and conditions include the following:

(a) The imposition of mandatory sanctions is a radical measure and is permitted only after all other peaceful means of settling the dispute or conflict have been exhausted, and only when the Security Council has determined the existence of any threat to the peace, breach of the peace or act of aggression;

(b) The application of sanctions is permissible only in the case of a real, objectively verified and proven threat to the peace or breach of the peace;

(c) The obligatory use, particularly in questionable cases, of - first and foremost - discretionary measures, including negotiations, provisional measures under Article 40 of the Charter, of "voluntary" (General Assembly) sanctions until the opportunity arises to apply Security Council sanctions;

(d) The inadmissibility of creating a situation in which the imposition of sanctions would cause significant material and financial damage to third States;

(e) The inadmissibility, without the appropriate Security Council decision, to make new demands on the State against which sanctions have been imposed, or to stipulate additional conditions for ending or suspending the sanctions;

(f) The obligation to make an objective assessment of the short- and long-term social and economic and humanitarian consequences of the sanctions during both the preparatory and implementation stage;

(g) The inadmissibility of imposing sanctions without a time limit.

9. In considering problems relating to sanctions, particular attention should be given to the concept of the "humanitarian limits" of the sanctions. The Russian Federation, which initiated the discussion on this subject in the United Nations, considers that the basic components of the concept could include the following:

(a) The inadmissibility of creating a situation in which the sanctions would cause unacceptable suffering among the civilian population, especially its most vulnerable sectors;

(b) The possibility of periodically adjusting the sanctions in the light of the humanitarian situation and depending on whether the State against which sanctions have been imposed is complying with the Security Council's demands;

(c) The possibility of including in Security Council decisions a provision on the temporary suspension of sanctions in extraordinary situations of force majeure in order to avert a humanitarian catastrophe;

(d) Guaranteed unimpeded and non-discriminatory access of humanitarian aid to the populations of countries against which sanctions have been imposed, particularly in the case of potentially unstable or least developed countries;

(e) Rejection of measures that could lead to an unacceptable deterioration of the situation of the civilian population and the collapse of the infrastructure of the State against which sanctions have been imposed;

(f) Greater attention to the opinions of international humanitarian organizations in the preparation and implementation of sanctions regimes;

(g) In the case of a full-scale economic embargo, allowing sanctions committees to approve the export of the domestic products of the country against which sanctions have been imposed in order to enable it to pay for humanitarian imports; such imports would, of course, be subject to strict international control;

(h) With a view to facilitating delivery of the most essential humanitarian supplies, waiving the requirement of providing preliminary notification to sanctions committees regarding the intended export of basic foodstuffs and medicines, and the adoption of the practice of post factum notification, that is, notification after delivery;

(i) The complete exemption of international humanitarian organizations from sanctions restrictions so as not to hamper their work in the countries against which sanctions have been imposed;

(j) Maximum simplification of the procedure for approving deliveries to the population of vitally needed humanitarian goods, and the exemption of medicines and basic commodities from any Security Council sanctions regime;

(k) Strict observance of the principles of impartiality and the inadmissibility of any form of discrimination in the provision of humanitarian and medical assistance and other forms of humanitarian aid to all sectors and groups of the population of all parties to the conflict.

10. These, and possibly other, ideas could form the basis for the drafting and approval within the Special Committee on the Charter of the United Nations, of a memorandum of understanding or other instrument dealing with the problems of sanctions. In the preparation of the instrument, account could be taken of the provisions of General Assembly resolution 51/208 of 17 December 1996 and the proposals contained in the Secretary-General's report of 30 August 1996 (A/51/317), in particular the proposals on a number of guidelines on technical procedures to be used by the Secretariat, and developing a possible methodology for assessing the consequences actually incurred by third States as a result of the implementation of the sanctions. The preparation of such a document would make it possible to elucidate the content and basic elements of the complex institution of sanctions, and strengthen the international legal basis for their application. This could be of great use in the work of both the Security Council and the United Nations as a whole and its regional organizations.

UNITED NATIONS **A**

General Assembly

Distr.
LIMITED

A/AC.182/L.95
28 January 1997
ENGLISH
ORIGINAL: SPANISH

SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION
27 January-7 February 1997

POSSIBLE AMENDMENTS TO THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE TO EXTEND ITS COMPETENCE WITH RESPECT TO CONTENTIOUS MATTERS TO DISPUTES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

Working paper submitted by Guatemala

A. Article 34, paragraph 1, should read:

"1. Only States and, under the conditions laid down in Articles 36A and 36B, the United Nations or any other international organization comprised of States, may be parties in cases before the Court."

B. Insert an Article 36A reading:

"Article 36A

"1. The Court shall be competent to deal with any dispute between a State member or a number of States members of an international organization, on the one hand, and the organization, on the other, where:

(a) The constituent instrument of the organization confers competence on the Court for such purpose and the dispute falls within the category or one of the categories of disputes provided for in the relevant provisions of the instrument; or

(b) A treaty to which all or a number of the States members of the organization are parties confers competence on the Court for such purpose, the State party or the States parties to the dispute are parties to the treaty, the dispute falls within the category or one of the categories of disputes provided for in the relevant provisions of the treaty, and the

organization has, by means of a declaration, already accepted the competence conferred on the Court by the treaty with respect to the dispute; or

(c) The State party or States parties to the dispute, on the one hand, and the organization, on the other, have decided, by special agreement, that the dispute shall be referred to the Court.

2. Article 36, paragraph 4, shall apply to declarations under paragraph 1 (b) above.

3. In the case of the United Nations, the prior acceptance of the competence of the Court provided for in paragraph 1 (b) above shall be set forth in a General Assembly decision.

4. In the event of a dispute as to whether the Court has jurisdiction under this Article, the matter shall be settled by the decision of the Court."

C. Insert an Article 36B reading:

"Article 36B

"1. The Court shall be competent to consider any dispute between a State or a number of States, on the one hand, and an international organization of which none of the States is a member, on the other hand, in accordance with the terms of a special agreement concluded between the two sides to the dispute.

"2. In the event of a dispute as to whether the Court has jurisdiction under this Article, the matter shall be settled by the decision of the Court."

D. Insert an Article 36C reading:

"Article 36C

"In any of the cases provided for in Articles 36A or 36B, neither Article 31, paragraphs 2 to 6, nor Article 34, paragraph 3, shall apply."

E. In Article 40, insert a paragraph 3A reading:

"3A. In any of the cases provided for in Article 36A, paragraph 1 (a) and (b), the dispute shall be referred to the Court by a written application addressed to the Registrar by either or any of the parties."

UNITED
NATIONS

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General Assembly

Distr.
LIMITED

A/AC.182/L.95/Rev.1
3 February 1997
ENGLISH
ORIGINAL: SPANISH

SPECIAL COMMITTEE ON THE CHARTER
OF THE UNITED NATIONS AND ON THE
STRENGTHENING OF THE ROLE OF THE
ORGANIZATION
27 January-7 February 1997

POSSIBLE AMENDMENTS TO THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE TO EXTEND ITS COMPETENCE WITH RESPECT TO CONTENTIOUS MATTERS TO DISPUTES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

Working paper submitted by Guatemala

A. Article 34, paragraph 1, should read:

"1. Only States and, under the conditions laid down in Articles 36A and 36B, the United Nations or any other international organization comprised of States and established by a multilateral treaty registered in accordance with Article 102 of the Charter of the United Nations, may be parties in cases before the Court."

B. Insert an Article 36A reading:

"Article 36A

"1. The Court shall be competent to deal with any dispute between a State member or a number of States members of an international organization, on the one hand, and the organization, on the other, where:

(a) The constituent instrument of the organization confers competence on the Court for such purpose and the dispute falls within the category or one of the categories of disputes provided for in the relevant provisions of the instrument; or

(b) A treaty to which all or a number of the States members of the organization are parties confers competence on the Court for such purpose, the State party or the States parties to the dispute are parties to the

treaty, the dispute falls within the category or one of the categories of disputes provided for in the relevant provisions of the treaty, and the organization has, by means of a declaration, already accepted the competence conferred on the Court by the treaty with respect to the dispute; or

(c) The State party or States parties to the dispute, on the one hand, and the organization, on the other, have decided, by special agreement, that the dispute shall be referred to the Court.

2. Article 36, paragraph 4, shall apply to declarations under paragraph 1 (b) above.

3. In the case of the United Nations, the prior acceptance of the competence of the Court provided for in paragraph 1 (b) above shall take the form of a General Assembly decision.

4. In the event of a dispute as to whether the Court has jurisdiction under this Article, the matter shall be settled by the decision of the Court."

C. Insert an Article 36B reading:

"Article 36B

"1. The Court shall be competent to consider any dispute between a State or a number of States, on the one hand, and an international organization of which none of the States is a member, on the other hand, in accordance with the terms of a special agreement concluded between the two parties to the dispute.

"2. In the event of a dispute as to whether the Court has jurisdiction under this Article, the matter shall be settled by the decision of the Court."

D. Insert an Article 36C reading:

"Article 36C

"In any of the cases provided for in Articles 36A or 36B, neither Article 31, paragraphs 2 to 6, nor Article 34, paragraph 3, shall apply."

E. In Article 40, insert a paragraph 3A reading:

"3A. In any of the cases provided for in Article 36A, paragraph 1 (a) and (b), the dispute shall be referred to the Court by a written application, which shall be addressed to the Registrar and shall indicate the subject of the dispute and the parties thereto."

F. In Article 53, paragraph 2, reference should be made to Articles 36A and 36B, in addition to Articles 36 and 37.

G. In Article 62, paragraph 1, add after the word "State" the words "or an international organization to which the Court is open in accordance with Article 34, paragraph 1".